Euroland & Development Sdn Bhd v Supreme Code Land Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1248–09 OF 2020
SUPANG LIAN, HASHIM HAMZAH AND AZMI ARIFFIN JJCA
20 MAY 2024

Contract — Sale and purchase of property — Breach — Failure of developer to deliver vacant possession of property — Damages in lieu of specific performance — Appeal against amount of damages awarded frustrate purchaser's of property — Breach — Failure of developer to deliver vacant possession of property — Allegation of non-compliance of developer's standard operating procedure ('SOP') by purchaser — Whether sale and purchase agreement must be executed by developer's sole authorised signatory — Whether SOP mere checklist for internal administrative purposes — Whether failure non-compliance of alleged SOP rendered sale and purchase agreement invalid — Whether allegation purchaser's gambling activity mere assumption — Whether alleged existence of forged documents an attempt by vendor to frustrate purchaser's claim

The defendant was a developer of a residential condominium development known as 'Damai Vista'. The plaintiff, through four different sale and purchase agreement ('SPA') had purchase four different units of residential condominium at Damai Vista from the defendant. The SPAs for these units were prepared by the defendant's solicitors. Despite price variations per unit, the defendant offered a rebate to the plaintiff, reducing the price of each unit to RM300,000 after applying a 'bulk purchase' discount. Subsequently, the plaintiff paid RM1.2m as the total purchase price of the four Damai Vista units to the defendant's solicitors, as a stakeholder until the agreements were signed by the defendant. When the plaintiff attended the defendant's office to inquire about the progress of these units and estimate the delivery of vacant possession, the plaintiff was informed by the defendant that the plaintiff's name was not listed as the buyer for these units. Upon seeking clarification, the defendant's solicitors confirmed to the plaintiff that they received instructions from the defendant to proceed with the SPAs and release the purchase funds. Despite this confirmation, the defendant did not fulfil their obligations, prompting the plaintiff to take this legal action against them. In defence, the defendant said that the units were not sold to the plaintiff due to the plaintiff's alleged non-compliances of the defendant's standard operating procedure ('SOP'). The defendant also alleged that the plaintiff and/or their representatives were nominees of a gambling junket, operating to lend money to individuals for the primary purpose of gambling, with the intention of charging interest on the borrowed funds. The trial court, however, allowed the plaintiff claim against

A the appellant, inter alia, for damages in lieu of specific performance amounting to RM1.2m in respect of four condominium units with costs of RM35,000. Aggrieved, the defendant had appealed to the present court vide encl 116. On the other hand, the plaintiff had filed a cross-appeal vide encl 11 to vary the damages/judgment sum since specific performance was not granted.

B

Held, allowing cross-appeal in encl 111 with costs; dismissing appeal in encl 116 with costs:

(1) The plaintiff had produced all the SPAs to prove that the plaintiff had indeed entered into a SPA and deed of mutual covenant for four units of condominium. The defendant's contention that the payment was not made to the defendant's Housing Development Account ('HD'), but instead was made to the defendant's solicitors was of no merit. This responsibility lay with the defendant to deposit into the HDA and not with the buyer (paras 16 & 18–19).

(2) On the allegation that the SPAs signed by the plaintiff were not valid due to the reason, inter alia, that these SPAs were not executed by DW10, the sole authorised signatory for all sale and purchase, it was evident from the evidence of witnesses that there were inconsistencies and uncertainties, especially regarding the SOP implemented by the defendant regarding the sale procedures of units in Damai Vista. Furthermore, that there was no evidence in the testimonies indicating when the SOP was enforced. Thus, the non-compliance of the alleged SPO did not invalidate the SPAs as the SOP were merely checklist for internal administrative purposes of the defendant. Failure to comply with these SOPs would not render the SPAs invalid (paras 20 & 23).

(3) The defendant provided no concrete evidence or explanation related to the plaintiff's involvement with the gambling syndicate, inter alia, lending money to persons for the sole or substantive purpose of gambling, with a view to charging interest on the money lent. It was a bare allegation by the defendant. The allegation of gambling activity run by the plaintiff and/or its representatives could not hold water as it was just a mere assumption made without any basis because throughout the trial there was no actual evidence led by the defendant to prove the existence of such allegation (para 32).

(4) The trial judge had correctly found that the letters dated 20 October 2017 from the defendant signed by Thomas Tong to the plaintiff clearly indicated that a rebate was provided and also confirm that the full purchase price as stipulated in the sale and purchase agreement was fully settled by the plaintiff. There was no justification to disturb the trial judge's decision on this point. Further, the defendant's contention that any receipt issued by the defendant alleged to be received by the plaintiff in relation to the units were forged was disagreed by the court. The

testimony of DW6, Senior Accounts Executive of the defendant company related more to the internal financial administrative procedures of the company rather than proving that the receipts were fake or counterfeit. In the circumstances, the alleged existence of forged documents was a clear attempt by the defendant to frustrate the plaintiff's claim and to avoid liability/payment to them (paras 33–36).

[Bahasa Malaysia summary

Defendan merupakan pemaju pembangunan kondominium kediaman yang dikenali sebagai 'Damai Vista'. Plaintif, melalui empat perjanjian jual beli ('SPA') berbeza telah membeli empat unit kondominium kediaman berbeza di Damai Vista daripada defendan. SPA untuk unit ini telah disediakan oleh peguamcara defendan. Walaupun terdapat variasi harga seunit, defendan menawarkan rebat kepada plaintif, mengurangkan harga setiap unit kepada RM300,000 selepas menggunakan diskaun 'pembelian pukal'. Selepas itu, plaintif membayar RM1.2 juta sebagai jumlah harga belian empat unit Damai Vista kepada peguamcara defendan, sebagai pemegang kepentingan sehingga perjanjian ditandatangani oleh defendan. Apabila plaintif hadir ke pejabat defendan untuk bertanya tentang kemajuan unit-unit ini dan menganggarkan penghantaran milikan kosong, plaintif telah dimaklumkan oleh defendan bahawa nama plaintif tidak disenaraikan sebagai pembeli unit-unit ini. Apabila mendapatkan penjelasan, peguamcara defendan mengesahkan kepada plaintif bahawa mereka menerima arahan daripada defendan untuk meneruskan SPA dan mengeluarkan dana pembelian. Walaupun pengesahan ini, defendan tidak memenuhi kewajipan mereka, menyebabkan plaintif mengambil tindakan undang-undang ini terhadap mereka. Dalam pembelaan, defendan berkata bahawa unit tersebut tidak dijual kepada plaintif kerana dakwaan plaintif tidak mematuhi prosedur operasi standard ('SOP') defendan. Defendan juga mendakwa bahawa plaintif dan/atau wakil mereka adalah penama perjudian, beroperasi untuk meminjamkan wang kepada individu untuk tujuan utama perjudian, dengan niat untuk mengenakan faedah ke atas dana yang dipinjam. Mahkamah perbicaraan bagaimanapun membenarkan tuntutan plaintif terhadap perayu, antara lain, untuk ganti rugi sebagai ganti perlaksanaan khusus berjumlah RM1.2 juta bagi empat unit kondominium dengan kos RM35,000. Terkilan, defendan telah merayu kepada mahkamah semasa melalui lampiran 116. Sebaliknya, plaintif telah memfailkan rayuan balas melalui lampiran 11 untuk mengubah jumlah ganti rugi/penghakiman memandangkan perlaksanaan khusus tidak diberikan.

Diputuskan, membenarkan rayuan silang dalam lampiran 111 dengan kos; menolak rayuan dalam lampiran 116 dengan kos:

(1) Plaintif telah mengemukakan semua SPA untuk membuktikan bahawa plaintif sememangnya telah menandatangani SPA dan surat ikatan perjanjian bersama untuk empat unit kondominium. Dakwaan

defendan bahawa bayaran tidak dibuat kepada Akaun Pembangunan Perumahan ('HD') defendan, sebaliknya dibuat kepada peguamcara defendan adalah tiada merit. Tanggungjawab ini terletak pada defendan untuk mendepositkan ke dalam HDA dan bukan kepada pembeli (perenggan 16 & 18–19).

(2) Mengenai dakwaan bahawa SPA yang ditandatangani oleh plaintif adalah tidak sah disebabkan oleh alasan, antara lain, bahawa SPA ini tidak dilaksanakan oleh DW10, satu-satunya penandatangan yang diberi kuasa untuk semua jual beli, ia terbukti daripada keterangan saksi bahawa terdapat percanggahan dan ketidakpastian terutama berkaitan SOP yang dilaksanakan oleh defendan berhubung prosedur penjualan unit di Damai Vista. Tambahan pula, tiada bukti dalam keterangan yang menunjukkan bila SOP dikuatkuasakan. Oleh itu, ketidakpatuhan SPO yang didakwa tidak membatalkan SPA kerana SOP hanyalah senarai semak untuk tujuan pentadbiran dalaman defendan. Kegagalan untuk mematuhi SOP ini tidak akan menyebabkan SPA tidak sah (perenggan 20 & 23).

(3) Defendan tidak memberikan keterangan atau penjelasan konkrit berkaitan penglibatan plaintif dengan sindiket perjudian, antara lain, meminjamkan wang kepada orang untuk tujuan perjudian tunggal atau substantif, dengan tujuan untuk mengenakan faedah ke atas wang yang dipinjamkan. Ia adalah dakwaan kosong oleh defendan. Dakwaan aktiviti perjudian yang dijalankan oleh plaintif dan/atau wakilnya tidak dapat dipertahankan kerana ia hanya andaian semata-mata yang dibuat tanpa sebarang asas kerana sepanjang perbicaraan tidak ada keterangan sebenar yang dibawa oleh defendan untuk membuktikan kewujudan dakwaan tersebut (perenggan 32).

(4) Hakim perbicaraan telah membuat dapatan dengan betul bahawa surat bertarikh 20 Oktober 2017 daripada defendan yang ditandatangani oleh Thomas Tong kepada plaintif dengan jelas menunjukkan bahawa rebat telah diberikan dan juga mengesahkan bahawa harga pembelian penuh seperti yang ditetapkan dalam perjanjian jual beli adalah diselesaikan sepenuhnya oleh plaintif. Tiada justifikasi untuk mengganggu keputusan hakim perbicaraan mengenai perkara ini. Selanjutnya, dakwaan defendan bahawa sebarang resit yang dikeluarkan oleh defendan yang didakwa diterima oleh plaintif berhubung dengan unit tersebut adalah palsu tidak dipersetujui oleh mahkamah. Keterangan DW6, Eksekutif Akaun Kanan syarikat defendan lebih berkaitan dengan prosedur pentadbiran kewangan dalaman syarikat dan bukannya membuktikan bahawa resit tersebut adalah palsu atau palsu. Dalam keadaan tersebut, dakwaan kewujudan dokumen palsu adalah percubaan jelas defendan untuk menggagalkan tuntutan plaintif dan mengelakkan liabiliti/pembayaran kepada mereka (perenggan 33–36).]

Legislation referred to

Evidence Act 1950 s 114(g)

Appeal from: *Supreme Code Land Sdn Bhd lwn Euroland & Development Sdn Bhd* [2020] MLJU 2163 (High Court, Kuala Lumpur)

Boey Kai Qi (Halim Hong & Quek) for the appellant.
Michael Chang (Gregory Chan Tam Moo & Ang) for the respondent.

Azmi Ariffin JCA:

INTRODUCTION

[1] *Enclosure 116 dated 9 September 2020* is the appellant/defendant notice of appeal against the whole of the decision of the Kuala Lumpur High Court after trial delivered on 10 August 2020 whereby the learned judicial commissioner allows the respondent/plaintiff claim against the appellant for, inter alia, damages in lieu of specific performance amounting to RM1.2m in respect of four condominium units in the Damai Vista Project with costs of RM35,000.

[2] *Enclosure 11 dated 2 November 2020,* is the respondent/plaintiff notice of cross-appeal relating only to the judgment sum allowed after the trial of the matter.

[3] For ease of reference, parties will be referred to as plaintiff and defendant respectively in this judgment.

BRIEF FACTS

[4] At all material times, the defendant was a developer of a residential condominium development known as 'Damai Vista' on land held under GM 8232 Lot 66147 (previously under HS(M) 22365, PT 59894 dan sebelumnya GM974 Lot No, 2223) Tempat Batu 13 Jalan Cheras Mukim Ceras Daerah Hulu Langat Negeri Selangor Darul Ehsan, whereas the plaintiff is the purchaser the units.

[5] The plaintiff had through four different sale and purchase agreement (SPAs) dated 14 November 2017, listed below had purchase four different unit on the said Damai Vista project from the defendant (*which was denied by the defendant*):

(a) sale and purchase agreement dated 14 November 2017 for Unit No A-08–03 Level No 8 Block A Type B measuring 1,100 sqft with accessory parcels No 4–54 and 4–551;

A (b) sale and purchase agreement dated 14 November 2017 for Unit No A-16–01 Level No 16 Block A Type B measuring 1,100 sqft with accessory parcels No 2–46 and 2–472;

(c) sale and purchase agreement dated 14 November 2017 for Unit
B No B-15–03 Level No 15 Block B Type B measuring 1,100 sqft with accessory parcels No 2–125 and 2–1263; and

(d) sale and purchase agreement dated 14 November 2017 for Unit No B-15–03A Level No 15 Block B Type B measuring 1,100 sqft with accessory parcels No 2–127 and 2–1284.
C

[6] The SPAs for these Units were prepared by the defendant's solicitors known as Messrs KV Ong, Chua & Partners (*defendant's panel solicitor*).

D **[7]** Despite price variations per unit, the defendant offered a rebate in a letter dated 20 November 2017, reducing the price of each unit to RM300,000 after applying a 'bulk purchase' discount.

[8] Subsequently, the plaintiff paid RM1.2m as the total purchase price of
E the four Damai Vista units to the defendant's solicitors, as a stakeholder until the agreements were signed by the defendant.

[9] However, around 4 January 2019, when the plaintiff's representative
F attended the defendant's office to inquire about the progress of these units and estimate the delivery of vacant possession, the plaintiff was shocked when informed by the defendant's representative that the plaintiff's name was not listed as the buyer for these units.

G **[10]** Subsequently, the plaintiff's solicitors sent letters on 10 January 2019, to both the defendant and the defendant's panel solicitor, seeking confirmation.

[11] The defendant's panel solicitors replied on 23 January 2019 confirming
H they received instructions from the defendant to proceed with the SPAs and release the purchase funds. Despite this confirmation, the defendant did not fulfil their obligations, prompting the plaintiff to take this legal action against them.

I **[12]** In the defendant's defence, the defendant said that according to the defendant's records, the units were sold to bona fide third parties who complied with the defendant's standard operating procedure (SOP). The units were not sold to the plaintiff due to alleged non-compliances with SOP.

[13] The defendant also alleged that the plaintiff and/or their representatives are nominees of a gambling junket, operating to lend money to individuals for the primary purpose of gambling, with the intention of charging interest on the borrowed funds.

[14] The learned judicial commissioner decided in favour of the plaintiff, hence the current appeal by the defendant.

[15] Subsequently, the plaintiff filed notice of cross-appeal to vary the damages from RM1.2m to the price of each unit since specific performance is not granted. plaintiff also pray for the defendant to pay the following amounts to them:

(i) a sum of RM758,588 for Condominium Unit No A-08-03 Level No 8 Block A Type B;

(ii) a sum of RM768.942 for Condominium Unit No A-16-01 Level No 16 Block A Type B;

(iii) a sum of RM767,647.99 for Condominium Unit No B-15-03 Level No 15 Block B Type B;

(iv) a sum of RM 767,647 for Condominium Unit No B-15-03A Level No 15 Block B Type B;

(v) interest at a rate of 5% shall be imposed on the amount of RM1.2m from 28 November 2017 (date of payment) until the date of judgment dated 10 August 2020; and

(vi) interest at a rate of 5% shall be imposed on each amount in para (i), (ii) (iii) and (iv) herein, from 11 August 2020 until the date of full settlement.

OUR DECISIONS

Whether the sale and purchase agreements for the units are valid?

[16] It was proven during the trial that the plaintiff had produced all the sale and purchase agreements (SPAs) to prove that the plaintiff had indeed entered into a sale and purchase agreement and deed of mutual covenant for four units of condominium. DW7, Jerrine Tee Sui Ling, the defendant's panel solicitor confirmed that she had witnessed the signature of the signatory to the SPAs between the plaintiffs and the defendant.

[17] DW8, the Partner of Messrs KV Ong, Chua & Partners who was also one of the lawyers from the defendant's panel solicitor confirmed that he indeed received instruction from the defendant for the preparation of these

SPAs. He also confirmed that the plaintiff has transferred the balance purchase price to the defendant's panel solicitor's firm as a stakeholder, and upon instruction from Tong Kah Hoe (also known as Thomas Tong), the Chief Operation Officer (COO) of the defendant, the money was then released to the defendant.

[18] The defendant's contented that the payment was not made to the defendant's Housing Development Account (HDA) (*one of the alleged breaches of SOP allegedly committed by the plaintiff*), but instead was made to the defendant's panel solicitors.

[19] With respect, we see no merit in this point. We agreed with the finding of the learned trial judge that this responsibility lies with the defendant to deposit into the HDA and not with the buyer. The burden is on the defendant to prove that payment was not received from the plaintiff. The learned trial judge had analysed this pertinent issue in her grounds of judgment, which we reproduce herein below, said:

> [31] Berdasarkan keterangan dalam mahkamah oleh saksi-saksi dan juga keterangan dokumen adalah tidak dapat dipertikaikan bahawa perjanjian perjanjian jual beli dan deed of mutual covenant tersebut adalah sah dan bayaran telah dibuat kepada defendan melalui Messrs KV Ong, Chua & Partners. (Sila rujuk kepada keterangan dokumen dalam eksh P13 dan P14 (ms 292–294 ID 'C'). Cek yang diisukan bertarikh 21 November 2017 dan penyata akaun menunjukkan pembayaran telah dijelaskan kedalam akaun Messrs KV Ong, Chua & Partners sebagai stakeholder pada tarikh yang sama. Seperti keterangan DW8, baki harga pembelian adalah RM876,000 dan dengan pembayaran tersebut keseluruhan harga pembelian (*full purchase price*) telah dibayar oleh plaintif kepada defendan. DW8 juga mengesahkan bahawa jumlah tersebut telah dibayar oleh plaintif dan di lepaskan kepada defendan (ms 278 Perenggan 30 NK).
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> [32] Defendan mempertikaikan menerima jumlah wang yang dibayar oleh Plaintif, apa yang menarik adalah mengikut keterangan DW6 terdapatnya tiga akaun defendan iaitu Akuan HOA, Akaun di AmBank, AmBank Current Akaun dan Hong Leong Bank. Mengikut beliau semua pembelian hartanah akan dimasukkan kedalam Housing Development Account (HOA). Dalam soalbalas peguam defendan ada menanyakan kepada PW3 bahawa sepatutnya pembayaran dibuat kepada Akaun HOA yang mana PW3 bersetuju, tetapi beliau membuat bayaran kepada peguam panel defendan.
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> [33] Mahkamah bersetuju dengan peguam plaintif bahawa adalah tugas defendan dan bukan plaintif untuk memastikan segala pembayaran pembelian hartanah tersebut dimasukkan kedalam Akaun HOA. Plaintif atau mana-mana pembeli tidak akan tahu kedalam akaun mana patut dibuat bayaran pem belian, kecuali dimaklumkan oleh defendan. Tanggungjawab tersebut adalah terletak kepada Oefendan untuk memasukkan kedalam Akaun HDA dan bukan pembeli. Perkara ini dijelaskan juga dalam keterangan DW9 yang mengatakan bahawa terdapat SOP

berkaitan pembayaran pembelian yang mana SOP tersebut dibuat oleh Lembaga Pengarah dengan feedback mereka tetapi tiadanya resolusi Syarikat berkaitan perkara ini.

[34] Dalam keterangan PW1 pembayaran dibuat kepada peguam panel defendan. DW8 menyatakan setelah mendapat arahan defendan beliau melepaskan bayaran kepada defendan melalui COO syarikat defendan. Walau apa pun adalah menjadi tanggungjawab defendan untuk memasukkan kedalam Akaun HOA mengikut SOP. Beban adalah diatas defendan membuktikan bahawa bayaran tidak diterima dari plaintif. Dalam perbicaraan tiada apa-apa penyata kewangan atau Akaun HOA dikemukakan untuk membuktikan sama ada pembayaran telah atau belum dibuat oleh plaintif. Perkara ini disahkan sendiri oleh DW9 dalam keterangannya.

[35] Mengambil kira keterangan saksi-saksi serta keterangan dokumen-dokumen, mahkamah lebih berat menyatakan bahawa perjanjian tersebut mengikut proses yang teratur dan sah sehingga perjanjian jual beli tersebut ditandatangani di hadapan peguam panel defendan pada 14 November 2017.

[20] In addition, it is interesting to note that throughout the trial, DW9 and DW10 had insisted that these SPAs signed by the plaintiff were not valid due to the reason that:

(a) plaintiff had not complied with the SOP set by the defendant company; and

(b) these SPAs were not executed by DW10, the sole authorised signatory for all sale and purchase.

[21] When DW10 was asked about whether there was a resolution passed by the Board allowing him only to sign all related SPA, DW10 answered in the negative and confirmed that it was an understanding by the Board and any changes will have to go to the Board of Directors.

[22] However, sad to say that there was no evidence lead by the defendant at all during the trial that such an arrangement had been made public, what more when there is no resolution passed. If the defendant's own panel solicitors does not know about such an alleged SOP on the signing of SPA what more the plaintiff herein.

[23] From the sequence of events as presented in evidence, the testimonies of defendant's witnesses DW6, DW7, DW8, DW9, DW10, it was evident that there were inconsistencies and uncertainties, especially regarding the SOP implemented by the defendant regarding the sale procedures of units in Damai Vista. Furthermore, that there was no evidence in the testimonies indicating when the SOP was enforced. Thus, suffice for us to conclude that the non-compliance of the alleged SPO does not invalidate the SPAs as the SOP are

merely checklist for internal administrative purposes of the defendant. Failure to comply with these SOPs would not render the SPAs invalid.

[24] The letters and receipts provided to the plaintiff confirm that the defendant acknowledged full payment for each unit. The confirmation letter, signed by Thomas Tong, Chief Operating Officer of the defendant and receipts issued by the defendant, indirectly fulfil the defendant's SOP.

Authorisation to sign receipts

[25] Dato Seri Choong Yuen Keong @Tong Yuen Keong (DW10) stated that only he had the authority to finalise the SPAs and Tong Kah Hoe (Thomas Tong) (who finalised the SPAs with the plaintiff) was never authorised to finalise the SPAs on behalf of the defendant.

[26] The defendant did not mention the name of Thomas Tong or any statement indicating that he had committed any wrongdoing in the police report made by DW9 on behalf of the defendant. From the testimony of DW10, he stated that he did not know why DW9 did not mention the forgery committed by Thomas Tong in the police report made by him on behalf of the defendant. On this issue, the learned trial judge in her grounds of judgment held among others as follows:

> [36] ... Report polis yang dibuat oleh DW9 menyebut tujuan dibuat seperti berikut:
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> > Tujuan laporan ini dibuat adalah sebagai perlindungan diri saya jika berlaku apa-apa dikemudian hari serta untuk rujukan pihak Mahkamah bagi tindakan selanjutnya.
>
> [37] Tiada dalam mana-mana perenggan dalam report tersebut menyebut nama Thomas Thong atau berlakunya frod oleh mana-mana pihak. Pihak plaintif melalui PW3 Dato Leong Kok Peng pula telah membuat report polis pada 8 Mac 2019 berikutan lawatan ke pejabat defendan pada 4 Januari 2019 di Pandan Perdana untuk mengetahui tarikh siap projek tersebut dan plaintif amat terkejut apabila dimaklumkan pegawai akaun defendan bernama Oscar bahawa empat unit yang dibeli oleh plaintif tiada dalam rekod mereka. Plaintif terasa ditipu kerana semua urusan diuruskan secara resmi melalui Peguam Panel Syarikat Euroland & Development (Messrs KV Ong, Chua & Partners) dan bayaran telahpun diterima oleh pihak defendan. Plaintif telah memasuki kaveat terhadap unit-unit tersebut dan membuat laporan polis. Tujuan laporan polis dibuat supaya tindakan diambil terhadap kes penipuan ini.

[27] It is difficult for us to ignored the fact that Thomas Tong is a nephew to DW10 and also one of the directors in the defendant company. Thus, the defendant is responsible for all actions taken by Thomas Tong in his capacity as the Chief Operating Officer of the defendant.

[28] Further, we find it a little bit strange for the defendant to place the burden on the plaintiff to call Thomas Tong as a witness to prove the issues of fraud claim brought up by them when it should be on them to shoulder the burden. More so when defendant's own witness list confirmed Thomas Tong's role as a witness for the defendant. Hence, it was always open to the defendant to call or subpoena Thomas Tong as their witness if they were of the view that the testimony extracted from this witness would be advantageous to their claim.

[29] The defendant cannot now turn around and be allowed to make sweeping statements that adverse inference under s 114(g) of the Evidence Act 1950 should be drawn against the plaintiff's inability to locate Thomas Tong, coupled with the lack of a subpoena against him.

Issue of fraud/gambling junket

[30] The case for the defendant's was founded on fraud, forgery, falsification and/or otherwise illegality that tainted the purported transactions for the disputed units, which directly challenged the plaintiff's claims. The defendant further avers that any agreement entered into by the plaintiff in relation to the subject units is not bone fide and illegal.

[31] It was glaring however that in the amended statement of defence (SOD), it was not clarified who actually committed the fraud, whether it was the plaintiff, Thomas Thong, or the defendant themselves. The police report dated 26 Mei 2019 also did not mention any issue of fraud.

[32] The defendant provided no concrete evidence or explanation related to the plaintiff's involvement with the gambling syndicate, inter alia, lending money to persons for the sole or substantive purpose of gambling, with a view to charging interest on the money lent. With respect, we find that the bare allegation by the defendant that the gambling activity run by the plaintiff and/or its representatives cannot hold water as it is just a mere assumption made without any basis because throughout the trial there was no actual evidence led by the defendant to prove the existence of such allegation.

Issue of rebate

[33] The letters dated 20 October 2017 from the defendant signed by Thomas Tong to the plaintiff clearly indicate that a rebate was provided and also confirm that the full purchase price as stipulated in the sale and purchase agreement was fully settled by the plaintiff. The learned trial judge addressed to the aforesaid issue in the following words:

A [44] Berkaitan dengan rebat yang dipertikaikan oleh defendan. Mengikut defendan jumlah RM 324,000 tidak disebut dalam Perjanjian Jual Beli dan tiada mana-mana dalam Perjanjian menunjukkan diskaun/rebat telah diberikan terhadap unit-unit tersebut. Mahkamah merujuk kepada surat bertarikh 20 Oktober 2017 (exh P15A, P16A, P17A dan P18A ms 103, 165, 227 dan 289 ID 'C') dari defendan yang
B ditandatangani oleh Thomas Tong kepada Plaintif. Surat-surat tersebut jelas menunjukkan bahawa rebat telah diberikan dan juga mengesahkan bahawa harga belian penuh (full purchase price) sebagaimana diperuntukkan dalam Perjanjian Jual Beli telah diselesaikan sepenuhnya oleh Plaintif. Perlu diberi penekanan bahawa surat-surat ini telah ditandatangani oleh Thomas Tong yang pada masa
C material adalah COO defendan. Beban adalah ke atas defendan untuk menyangkal perkara ini yang mana tidak dibuktikan.

[45] Berkaitan isu rebat diberikan sebelum perjanjian ditandatangani dan sebelum harga belian penuh dibayar. Jika dilihat kepada exh P1SA, P16A P17A dan P18A (ms 104, 166, 228 & 290 IDB J2 'C') surat defendan bertarikh 20 Oktober 2017,
D rebat telah dibenarkan sebelum Perjanjian Jual Beli ditandatangani. Ini selaras dengan perenggan ketiga surat-surat tersebut yang menyatakan bahawa dengan rebat tersebut harga belian penuh (*full purchase price*) seperti dalam perjanjian jual beli telah dibayar sepenuhnya. Mahkamah berpendapat surat tersebut menyatakan bahawa harga yang tertera dalam perjanjian jual beli adalah terbayar
E keseluruhannya setelah plaintif membuat bayaran sebanyak RM1.2 juta untuk unit-unit tersebut.

[46] Keterangan DW4 dan DW5 iaitu pembantu undang-undang dan peguam panel mengesahkan bahawa dokumen perjanjian jual beli akan disediakan oleh peguam asalkan terdapatnya surat yang mengesahkan sama ada dari Pemaju atau
F peguam pembeli bahawa jumlah perbezaan diantara perjanjian jual beli dan jumlah pinjaman dimaklumkan kepada peguam. Beliau juga menjelaskan bahawa jika terdapatnya diskaun atau rebat ianya tidak akan ditunjukkan dalam perjanjian jual beli.

G **[34]** We agree with the reasons given by the learned trial judge. We see no justification to disturb her decision on this point.

Issue of forged receipt

H **[35]** The defendant in the amended statement of defence further argued that any receipt issued by the defendant alleged to be received by the plaintiff and/or its representatives in relation to the subjects units are forged. With greatest respect, we beg to differ. The alleged existence of forged documents is a clear attempt by the defendant to frustrate the plaintiff claim and to avoid
I liability/payment to them.

[36] We concur with the learned trial judge opinion that the testimony of DW6 Wong Lee Chin, Senior Accounts Executive of the defendant company more related to internal financial administrative procedures of the company

rather than proving that the receipts were fake or counterfeit. The well-reasoned findings of the learned trial judge speaks volume. She had this to say:

> [47] Keterangan DW9 pula mengatakan beliau tidak tahu tandatangan siapa pada resit tersebut dan mengatakan ianya adalah dipalsukan (rujuk eksh P15A, P16A, P17A dan P18A/ms 104, 166, 228 dan 290 IDB J2 'C'). DW9 membuat perbandingan dan merujuk kepada resit di eksh D26 dan D22 (ms 484 dan 575 IDB J3 'C') yang dikeluarkan oleh defendan. Terdapatnya perkataan 'Authorised By' dalam resit tersebut yang hanya boleh ditandatangani oleh beliau atau mana-mana orang yang diberi kuasa untuk menandatangani. Menurut DW9 beliau tidak tahu tandatangan siapa yang ada pada resit-resit yang diberikan kepada plaintif dan bukannya juga tandatangan DW6.
>
> [48] Mengikut DW9 lagi, resit yang dikeluarkan oleh defendan kepada pembeli pihak ketiga adalah seperti di muka surat 1 hingga 4 ID 'G' contoh resit No 00000164, 00000165, 00000165 dan 00000167. Keterangan beliau bahawa resit tersebut adalah sama dengan yang dikeluarkan kepada plaintif. Bila mahkamah merujuk kepada resit yang diberikan kepada plaintif merujuk exhibit P15A, P16A, P17A dan P18A (ms 104, 166, 228 dan 290 IDB J2 'C') didapati nombor yang tertera adalah DVC/0000164, DVC/0000165, DVC/0000166 dan DVC/0000167, terdapatnya perbezaan dimana angka resit yang diberikan kepada plaintif terdapat tujuh angka manakala yang defendan keluarkan adalah lapan angka. Terdapat keraguan disini dan tidak boleh dipastikan resit mana yang dipalsukan atau berkemungkinan dua resit dikeluarkan serentak disebabkan terdapatnya double sales. Resit-resit yang dikemukakan oleh defendan tersebut walaupun number yang sama dengan resit yang diberikan kepada plaintif tetapi tidak merujuk kepada pembeli pihak ketiga dalam kes ini.
>
> [49] Mahkamah juga merujuk kepada keterangan DW6 Wong Lee Chin, Eksekutif Akaun Kanan syarikat defendan. Mengikut beliau skop kerja beliau adalah untuk menandatangani resit rasmi berkaitan penjualan hartanah antara defendan dan Pembeli untuk projek Damai Vista.
>
> [50] DW6 pula membuat perbandingan resit-resit dan merujuk kepada D26 (ms 484 ID 'D' dan eksh D22 (ms 575 ID 'D') beliau mengesahkan bahawa tandatangan tersebut adalah tandatangan beliau dan bila dirujuk kepada resit yang dikeluarkan kepada plaintif di eksh P15B, P16B, P17B dan P18B beliau tidak mengenali tandatangan siapa yang tertera disitu. Mengikut beliau bukan menjadi amalan Bahagian Akaun untuk menggunakan chop/stamp pada resit-resit tersebut. Saksi merujuk pula kepada eksh D35, D36, D37 dan D38 (ms 1-4 ID'G') dan mengesahkan bahawa semua resit rasmi defendan ditandatangani oleh beliau sendiri di atas perkataan A/C Dept untuk setiap pembelian Damai Vista. Mahkamah berpendapat keterangan beliau lebih kepada prosedur kewangan pentadbiran dalaman syarikat dan bukannya membuktikan bahawa resit tersebut adalah palsu atau tiruan.

Double sales/booking form

[37] We find that it is not necessary for us to deliberate at length on this issue, safe to say that based on facts and evidence available, we agree with the trial judge's finding that the defendant committed double sales. Reference was made to the DW9's testimony which gathered that not only did the plaintiff experience double sales issues, but also other buyers. This issue had been dealt with thoroughly and extensively by the learned trial judge to support her finding, which we now reproduce:

> [51] DW6 juga semasa disoalbalas oleh peguam plaintif berkaitan booking form (eksh D31 ms 295 ID'D') menyatakan tidak tahu tentang dokumen ini disebabkan beliau tidak terlibat dengan penjualan cuma dengan akaun sahaja. Bila ditanya berkaitan commitment fee yang di bayar oleh pembeli beliau tidak dapat menjawab sama ada wang tersebut akan dimasukan ke dalam akaun defendan. Mengikut beliau selalunya Bahagian Pentadbiran yang sediakan resit dan bank in slip dan DW6 akan menandatangani dan memulangkan semula kepada kakitangan Pentadbiran.
>
> [52] Bila DW6 merujuk kepada P15B, P16, P17B dan P188 resit yang diberikan kepada plaintif, beliau menyatakan bahawa butiran chop/stamp yang digunakan tertera nama dan alamat defendan dan adalah sama dengan resit yang ditandatangani oleh beliau, cuma orang yang menandatangani adalah berbeza. DW6 juga tidak dapat memberikan penjelasan apakah sebenarnya polisi defendan berkaitan pengeluaran resit kepada pembeli oleh defendan.
>
> [53] Kalau dilihat kepada keterangan Normann Chow Won Hui (DW9) pengurus jualan syarikat defendan, mengikut beliau unit-unit tersebut telah dijual kepada pembeli pihak ketiga seperti berikut:

Unit No	Purchaser	Tarikh S&P/DMC	Booking Form
A-08-03	Chea Sin Li	12.12.2017	[BF 12.1.2017]
A-16-01	Wong Chee Wah & Karen Soo Soh May	15.11.2017	[BF 15.11.2017]
B-15-03	Ong Swee Hon &	2.5.2018	[BF Tiada Tarikh]
B-15-3A	Cheong Pei Kar	8.3.2018	Resit 2.5.2018
	Liew Chee Siong&		[BF Tiada Tarikh]
	Lee Suat Chian		Resit 13.3.2018

> [54] Dari *booking form* dan tarikh perjanjian jual beli yang ditandatangani oleh pembeli pihak ketiga adalah jelas bahawa perjanjian-perjanjian jual beli dan DMC oleh plaintif dengan defendan adalah lebih awal dari pembeli pihak ketiga. Plaintif telah menandatangani perjanjian pada 14 November 2017 manakala pihak pembeli pihak ketiga menandatangani perjanjian dengan defendan selepas tarikh tersebut (rujuk kepada perenggan diatas). Apa yang jelas terdapatnya double sales disini. Kenapa perkara ini berlaku? Seperti keterangan DW8 beliau sendiri kehairanan akan kejadian di mana plaintif tidak didaftarkan sebagai pembeli unit-unit tersebut.
>
> [55] DW9 dalam keterangannya juga mengatakan bahawa terdapatnya SOP untuk penjualan unit Kondominium di Damai Vista yang telah digariskan oleh Lembaga Pengarah seperti berikut:
>
> (1) The defendant will be informed by its representatives of any potential sale.

(2) The defendant will receive the relevant booking form for the sale. A

(3) The defendant will receive the earnest deposit from the purchaser in relation to the sale.

(4) The defendant will be informed of all loan approvals, if any, from the purchaser in relation to the sale. B

(5) The defendant will be informed by its panel solicitors of the sale.

(6) The defendant's Group Managing Director, Dato' Seri Choong Yuen Keong @ Tong Yuen Keong, will execute all sales and purchase agreements in relation to the sale. C

(7) The defendant will receive payment in relation to the sale.

(8) The defendant will issue the relevant invoices in relation to the sale.

(9) The defendant will issue the relevant receipts in relation to the sale.

[56] Menurut DW9 terdapat lima agensi yang mengendalikan penjualan Damai Vista dan SOP seharusnya digariskan untuk dipatuhi oleh agensi. Dalam penjualan ini booking form adalah penting seperti dalam eksh D31 (ms 295–296 ID 'C'). D31 adalah berkaitan dengan unit No A-08-03 yang telah dibayar commitment fee sebanyak RM 2000 oleh pembeli Chea Sin Li (DW3). Agen yang terlibat ialah Alan Tan. Bayaran dibuat kepada peguam panel defendan sebagai stakeholder. D E

[57] DW9 menyatakan bahawa booking form disediakan oleh agensi bagi pihak defendan. Persoalan sama ada terjadinya double sales dalam kes ini. DW9 mengatakan bahawa mereka tidak mengetahui bahawa unit-unit tersebut telah dijual kepada plaintif dan tidak dimaklumkan oleh peguam panel defendan. Defendan juga tiada menerima apa-apa bayaran berkaitan unit-unit tersebut daripada plaintif. F

[58] DW9 bersetuju semasa disoalbalas oleh peguam plaintif bahawa bayaran *commitment fee* tersebut tiada implikasi undang-undang terhadap pembeli. Tujuan utama adalah untuk dapatkan butiran pembeli dan juga butiran pinjaman kewangan oleh bakal pembeli. Apabila pinjaman (*loan*) diluluskan pihak-pihak akan menandatangani perjanjian jual beli dan DMC. DW9 mengatakan bahawa booking form tersebut adalah penting disebabkan peguam panel defendan akan menanyakan tentang booking form dan earnest money sebelum perjanjian jual beli disediakan. G

[59] Mahkamah juga merujuk kepada surat peguam panel defendan bertarikh 23 Januari 2019 berkenaan perkara ini (rujuk ms 16–17 Ikatan Dokumen Bersama 'B'). DW8 dalam keterangan beliau mengesahkan bahawa adakalanya terdapatnya double sales dalam penjualan hartanah. H

[60] Berkaitan terjadinya double sales, mahkamah merujuk keterangan keterangan DW9 semasa dalam soalbalas oleh peguam plaintif berkaitan surat jawapan peguam panel defendan kepada peguam plaintif bertarikh 23 Januari 2019 seperti berikut: I

Muka Surat 357 perenggan 7 hingga 20 NK

MC: But mere letter to inquire about the status as to why they were not listed. Why did you not reply to the letter after receiving confirmation from KV Ong?

NORMANN: Because at that point in time, there were, there, were a lot of purchasers so call purchasers coming up to office. And then they claim that they have signed an S&P and paid the money to Thomas Tong. And then when we check in the system, it's not registered as purchasers. So, at that time, there were, there too many of this kind of inquiries, So ...

MC: And you choose to ignore it.

NORMANN: We did not choose to ignore it. But we, we have, we have kept the, a record of all. But if there were instructions from the top management that if it's just a letter of demand, then we will try to reply. Because you know.

Muka surat 362 perenggan 7 hingga 15 NK.

MC: 25th. Ok. In your own words, you say that at that point in time in January when you receive the, your inquiry, you say it was not necessary to reply. What makes you think it was necessary to reply after 25th of May 2019?

NORMANN: I believe there was an earlier police report made by my CFO Mr Poo. I don't know when the date, around which date was it. But it was around that time that we receive the lot of this kind of letters. Not only from Supreme Code Land. But also, from different parties. There are so many Yang Arif. I can't remember.

[61] Keterangan DW9 jelas menunjukkan bahawa bukan sahaja plaintif yang mengalami masalah double sales, tetapi juga pembeli-pembeli yang lain.

[62] Mahkamah lebih berat membuat kesimpulan bahawa tidak adanya prosedur yang jelas dan telus tentang penjualan unit-unit di Damai Vista. Terdapatnya keraguan seperti berikut: pertama, bayaran sepatutnya dibuat kepada siapa ? Kedua, apakah peranan Agen sebenarnya? Ketiga sama ada Agen mengetahui akan terdapatnya SOP? (perlu diberi penekanan bahawa tiadanya keterangan bila SOP tersebut berkuatkuasa).

[63] Mahkamah juga mengambil kira bahawa Thomas Tong adalah COO defendan pada masa material dan bertindak bagi pihak defendan. Perkara ini disokong oleh keterangan DW8 bahawa selalunya arahan akan diberikan oleh Thomas Tong kepada peguam panel defendan untuk mengambliapa apa tindakan berkaitan perjanjian jual beli. Defendan tidak boleh dikecualikan dari bertanggungan untuk memastikan bahawa perkara double sales tidak berlaku. DW8 juga ada menyatakan dari pengalaman memang terdapat berlakunya double sales dalam urusan penjualan hartanah. DW9 juga menjelaskan jika tidak dibatalkan salah satu akan terjadinya double sales.

[64] Defendan adalah syarikat tersenarai awam (*public listed company*) dan semestinya pembeli beranggapan bahawa perkara seperti ini tidak sepatutnya berlaku. Bukan menjadi tanggungjawab pembeli untuk mengetahui apakah polisi dalaman defendan dalam urusan penjualan unit unit di Damai Vista.

CONCLUSION

[38] We had perused all the cause papers and had considered the submissions of parties. On evidence, we were fully satisfied that the learned

trial judge findings were fully supported by the documentary evidence heaped against the defendant. We are of the view that there is no appealable error in her decision in allowing the plaintiff's claim. Hence, it leaves no leeway for appellate interference in all the circumstances of this case. We unanimously make the following order:

(a) appellant/defendant main appeal in encl 116 is dismissed with cost of RM25,000 to the plaintiff;

(b) respondent/plaintiff cross-appeal in encl 11 prayers 4(a)(i)-(iv), (b)(i)-(iv), (c) and (d)(i)-(iv) is allowed with cost of RM5,000; and

(c) costs awarded are subject to allocatur fees of 4%.

Order accordingly.

Reported by K Selvaraju